IN THE

Supreme Court of the United States

October Term, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Respondent.

BRIEF FOR THE PETITIONER

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Opinions of the Court Below

The majority opinion of the United States Court of Appeals for the Second Circuit (Circuit Judge Hand and Circuit Judge Hincks) (R. 147), and the dissenting opinion of Circuit Judge Lombard (R. 154), is reported at 251 F. 2d 708.

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant, a New York Corporation.

The Judgment of the United States Court of Appeals for the Second Circuit was entered on January 10, 1958 (R. 161). Petition for rehearing was denied on January 31, 1958 (R. 171). Petition for hearing *en banc* was denied on February 20, 1958 (R. 172).

The jurisdiction of this Court was invoked under Title 28 U. S. Code, Section 1254 (1). The petition was filed on April 28, 1958, and was granted on June 9, 1958.

Questions Presented

1. Whether an action, brought pursuant to a State Wrongful Death Statute is to be determined by the State rule of contributory negligence or by the Admiralty rule of comparative negligence?

2. Whether a State Wrongful Death Statute may be extended by a Federal Court, to encompass an action for unseaworthiness, without regard to the substantive law of the State?

3. Whether the warranty of seaworthiness extends to a shoreside electrician employed by a sub-contractor, to clean generators aboard a vessel while it was out of operation in a repair yard?

4. Whether a jury should be permitted to draw inferences when there is a complete absence of probative facts to support the conclusion reached?

The Statute Involved

The plaintiff sued in the United States District Court for the Southern District of New York to recover damages under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, the relevant section of which reads as follows:

> "2A:31-1 When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not insued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Statement

The plaintiff, as administratrix of the Estate of Walter J. Halecki, brought suit in the United States District Court for the Southern District of New York, to recover damages for the personal injuries and death of the decedent, who died on October 12, 1951, allegedly as a result of the negligence of the defendants and the unseaworthiness of the pilot boat "New Jersey", owned by the defendants. The action was brought pursuant to the New Jersey Wrongful

Death Act, N.J.S.A. 23:31-1, and the complaint alleged diversity of citizenship.

The facts which took place were as follows:

On September 22, 1951 the pilot boat "New Jersey" was turned over to Rodermond Industries, Inc., for the purpose of annual overhauling and inspection (R. 122), which were undertaken by Rodermond in accordance with an agreement with the defendants (R. 77). At the time of the incident the vessel was moored at a pier in the repair yard of Rodermond, North River, Jersey City, New Jersey, and was out of operation (R. 13). The only employee of the defendants aboard was a watchman (R. 135).

Walter Halecki, the plaintiff's decedent was an electrician employed by K & S Electrical Company (R. 69), a subcontractor engaged by Rodermond to do electrical work aboard the ship. Neither K & S nor Rodermond, both Jersey corporations (R. 16), are parties to this action. On September 29, 1951 the decedent came aboard the vessel together with a co-employee of K & S Electrical Company, one Donald Doidge. These electricians received their instructions from their employer, K & S Electrical Company, which had undertaken to perform electrical work on the ship, in accordance with specifications given it by Rodermond Industries, Inc. (R. 72). These specifications included cleaning the generators on the ship, which was the work performed by the decedent and Mr. Doidge on September 29, 1951 (R. 71-73).

Donald Doidge, who had previously given a deposition for the defendants, testified on behalf of the plaintiff at the trial. Mr. Doidge was the only factual witness intro-

duced by the plaintiff, and was the only person present at the time the work was done, in addition to the decedent.

Mr. Doidge, who was in charge of the work, testified that the date, the time and the manner in which this work was to be done, were left to his discretion (R. 11-13), and that the customary method for cleaning generators was by use of carbon tetrachloride (R. 11). On September 28, 1951, the day before the work was actually done, Doidge and Halecki set up the equipment which was to be used, including air hoses and an electric blower, supplied by Rodermond (R. 12). The power was produced by shore generators, owned by Rodermond, as the "New Jersey" was a dead ship, i.e., it did not produce its own power (R. 12-13).

On the morning of September 29, 1951, the K & S employees, under the supervision of Mr. Doidge, set up portable blowers in the engine room where they were working, and also brought gas masks with them, as the cleaning of the generators was done by spraying them with carbon tetrachloride (R. 98-99). The engine room where this work was done was only one level below the main deck, and both doorways and the skylight were open (R. 6-15). The ship's ventilation system was operated by power from a generator on shore (R. 7-8).

Mr. Doidge testified that the decedent did most of the actual spraying, and that he wore a gas mask during the performance of the work, which continued uneventfully from 8:30 A.M. to 4:00 P.M. The decedent left Mr. Doidge without making any complaint other than that he had a peculiar taste in his mouth (R. 10-11).

Mr. Halecki became ill at home, and on October 2, 1951, was admitted to the Medical Center in Jersey City, where

he died on October 12, 1951. The hospital record stated that the cause of death was carbon tetrachloride poisoning, and the record also disclosed that the decedent had habitually consumed excessive amounts of alcohol (R. 17-18).

Mr. Doidge testified that all of the equipment and ventilation systems had operated perfectly during the day (R. 12-16), and that in his opinion the ventilation was adequate (R. 13), and also that he and the decedent had used carbon tetrachloride on many occasions, and were completely familiar with its properties (R. 11) (R. 104).

Robert Gaines, a bio-chemist, testified as an expert on behalf of the plaintiff, regarding the qualities of carbon tetrachloride, and the degree of concentration necessary to produce a dangerous condition (R. 18-19). Mr. Gaines had never been aboard the pilot boat "New Jersey" (R. 28), and his testimony as an expert was based upon the description of the engine room given by witness, Donald Doidge, and also upon certain photographs of the engine room which had been introduced (R. 19).

Mr. Gaines testified that a safe concentration of carbon tetrachloride was 100 parts per million (R. 18), and that in his opinion, a concentration of 20,000 parts per million existed in the engine room of the pilot boat "New Jersey" (R. 23). Upon cross-examination, Mr. Gaines admitted that the concentration of carbon tetrachloride would depend upon such factors as the horse power of the ventilator motors (R. 28), the location of the ducts, the size and angle of the fan blades (R. 30), the location of exhaust vents, the size and arrangement of portable blowers and air hoses (R. 28), and the condition of the gas mask used (R. 30). The witness further testified that these factors, which

were unknown to him, were essential in estimating the concentration (R. 31).

The defendants introduced the testimony of William M. Finkenaur, a marine engineer who had actually tested the ventilation system aboard the vessel. Mr. Finkenaur testified that the system was entirely adequate and efficient to perform the function for which it was designated (R. 40).

The defendants also produced as an expert witness, Dr. Milton Helpern, the New York State Medical Examiner, who emphasized that a person who drinks to excess has a strong pre-disposition to carbon tetrachloride poisoning (R. 37). Dr. Helpern reviewed the medical records of the decedent, and stated, that in his opinion, Mr. Halecki's history of alcoholism created a susceptibility to a slight exposure of the substance (R. 39).

The case was tried before the Honorable Edward Weinfeld and a jury in December, 1956, and January, 1957, and resulted in a jury verdict in favor of the plaintiff in the total amount of $65,000 (R. 64). After judgment was entered, the defendants filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit (R. 67).

The appeal was argued in the United States Court of Appeals for the Second Circuit on November 21, 1957, before Circuit Judges Hand, Lumbard and Hincks. On January 10, 1958, the opinion of the Court of Appeals was handed down and judgment entered. The majority, consisting of Circuit Judges Hand and Hincks affirmed the judgment of the District Court (R. 147), and Circuit Judge Lumbard dissented (R. 154).

The majority opinion delivered by Circuit Judge Hand held that the decedent performed the type of work which

entitled him to the warranty of seaworthiness, and that the New Jersey Death Statute was broad enough to encompass a claim for unseaworthiness. The majority also held that the Trial Court properly applied the maritime rule of comparative negligence rather than the state doctrine of contributory negligence. The majority rejected the appellant's contention that the record below was insufficient to support the jury verdict.

The dissenting opinion of Circuit Judge Lumbard held that the decedent's work as a shoreside electrician was not that traditionally done by seamen, and he therefore was not entitled to the warranty of seaworthiness. Circuit Judge Lumbard also disagreed with the majority's view that a maritime claim brought pursuant to the New Jersey Death Statute was not subject to the defense of contributory negligence.

Subsequently, on January 24, 1958, the petitioner filed a petition for re-hearing (R. 163) and a petition for hearing *en banc* (R. 169), together with a motion to stay the mandate. The petition for re-hearing was denied on January 31, 1958, with Circuit Judge Lumbard dissenting. The petition for hearing en banc was denied on February 20, 1958, again over the dissent of Circuit Judge Lumbard. The motion to stay the mandate was unanimously granted on February 27, 1958. The petition for a writ of certiorari was filed on April 28, 1958, and was granted on June 9, 1958.

SUMMARY OF ARGUMENT

POINT I

The State rule of contributory negligence should be applied to an action under a state wrongful death act.

This respondent sued under the New Jersey Wrongful Death Act, as the General Maritime Law contains no provision for a death action. Her rights, as the administratrix of a fatally injured shore worker, are therefore derived solely from the state statute. *Lindgren* v. *United States*, 281 U. S. 38 (1930).

Admiralty Courts recognized that the General Martime Law has been supplemented by State Death and Survival Statutes, which supply rights not given by Maritime Law. *Western Fuel* v. *Garcia*, 257 U. S. 233 (1921); *Just* v. *Chambers*, 312 U. S. 383 (1941).

The question then arose as to whether Federal Courts would enforce these state created rights in accordance with state or maritime rules. This Court has decided that the validity of state created rights would be determined in accordance with state substantive law. *The Harrisburg*; 119 U. S. 199 (1886).

It has been specifically held that suits brought under a state wrongful death act must be subject to the limitations contained in the state law which created the right. *Western Fuel* v. *Garcia*, 257 U. S. 233 (1921); *Levinson* v. *Deupree*, 345 U. S. 648 (1953).

The particular question in the instant case is whether the maritime rule of comparative negligence or the State

principle of contributory negligence should be applied to an action under a wrongful death act. An explicit answer has been given by the various Circuit Courts of Appeal, which have almost uniformly applied the state rule of contributory negligence to actions brought to enforce state given rights.

Graham v. *Lusi Ltd.*, 206 F. 2d 223 (CA-5, 1953) *Hartford Accident Indemnity Company* v. *Gulf Refinery Company*, 230 F. 2d 346 (CA-5, 1956); *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955).

Of particular significance is the decision of *Hill* v. *Waterman*, 251 F. 2d 655 (CA-3, 1958), in which the Third Circuit decided that contributory negligence should be a defense to an action brought under the New Jersey Wrongful Death Act.

Hill was decided by the Third Circuit shortly after the *Halecki* decision was handed down. The Second Circuit in *Halecki* had relied upon the holding in *Skovgaard* v. *The M/V Tungus*, 252 F. 2d (CA-3, 1957), in finding that the New Jersey Death Statute encompassed unseaworthiness. However, the Halecki decision took the additional step of applying comparative negligence, which was expressly rejected by the Third Circuit in *Hill* v. *Waterman*.

The Courts have followed the general rule of determining the rights of litigants in accordance with the substantive law of the jurisdiction in which each right originates. Equal protection has been given to state and federal created rights.

Garrett v. *Moore McCormack*, 317 U. S. 239 (1942).

There is no question that contributory negligence is a complete bar to recovery in New Jersey. *Blaker* v. *The Receivers of the New Jersey Midland Railroad Company*, 30 N. J. Eq. 240 (1878).

The decision of this Court in *Pope and Talbot* v. *Hawn*, 346 U. S. 406 (1953), has been cited as authority for applying the maritime rule of comparative negligence to the instant case. However, Hawn was an injured but living plaintiff, and it is not disputed that his rights, to sue for negligence and unseaworthiness, were given by Maritime law. Hawn, unlike Halecki, was not required to rely on a state created right, and therefore was not bound by state limitations.

The right of this respondent was created by the state death statute, and was not rooted in federal maritime law. Again, the substantive law to be applied in each case depends on the origin of the right.

The *Hawn* decision was consistent with this principle, and is not authority for applying the maritime comparative negligence rule to an action brought under a State Death Statute.

Moreover, the nature of the right given by a Wrongful Death Statute is completely different from the rights given a living claimant by the General Maritime Law. An injured person sues for his own damages, including his pain and suffering, lost income and medical expenses. A Lord Campbell's Act, on the other hand, gives to a decedent's dependents the right to sue for their own damages, consisting of the loss of anticipated income suffered because of the death.

The distinction between these rights is emphasized by the existence of both wrongful death statutes and survival statutes, which preserve the rights a decedent had prior to his death. It is significant that this claimant sued only under the Wrongful Death Act of New Jersey, and not under the New Jersey Survival Statute.

Litigants will not receive equal protection of the law unless their rights are determined in accordance with the jurisdiction where they originated. The obligations of this defendant are imposed upon it by state law, which would also be the source of that defendant's rights. The application of the maritime rule of comparative negligence would deprive this and other marine defendants of a defense given to every other party sued under the state death statute.

Persons engaged in the maritime industry thereby become the only class of litigants to bear the obligations imposed by state law without the protections of that law.

Moreover, a person suing under the Wrongful Death Act because of the death of a maritime employee would receive preferential treatment over other claimants, suing under the same statute, as a result of fatal injuries suffered ashore.

POINT II

The New Jersey Wrongful Death Act does not give a cause of action for unseaworthiness.

There is no cause of action for wrongful death under the General Maritime Law, *The Harrisburg,* 119 U. S. 199 (1886), and a claimant seeking damages for maritime injuries resulting in death may sue under the Wrongful Death Act of the state within which the accident occurred. *Western Fuel* v. *Garcia,* 257 U. S. 233 (1921).

This claimant sued under the New Jersey Wrongful Death Act, N.J.S.A. 2:3;-1 through 6, for pecuniary damages resulting from the death of the decedent, and can only rely on rights created by state law.

It is the position of the petitioner that the New Jersey Wrongful Death Act does not afford a right to sue for unseaworthiness. The language of the statute, the nature of the rights to be enforced, the intent of the legislature, and the applicable decisions all fail to support the interpretation of the respondent.

The language of the statute gives an action based on "act, neglect or default", and the *Halecki* opinion held that these words encompass unseaworthiness. However, the elements of unseaworthiness are fundamentally different from those of negligence, which depends on such factors as lack of due diligence, notice and control. None of these elements are necessary to establish unseaworthiness. *Seas Shipping* v. *Sieracki,* 328 U. S. 85 (1946); *Alaska Steamship Co., Inc.* v. *Petterson,* 347 U. S. 396 (1954); and

Boudin v. *Lykes Brothers Steamship Co., Inc.*, 348 U. S. 336 (1955).

It has also been argued that the decedent's dependents should receive the same right to sue for unseaworthiness that he would have had if he had lived. This argument ignores the basic difference between the rights of an injured but living party, and the rights given to his dependents.

An injured litigant has a maritime right to sue for his own damages, consisting of his pain and suffering, lost income and medical expense. However, his dependents have a separate right, to recover their damages, caused by the decedent's death. This cause of action, to recover for loss of anticipated support, does not exist at Maritime Law, and does not come into being until the decedent's death.

Curtis v. *Garcia*, 241 F. 2d 30 (CA-3, 1957).

The fact that the New Jersey Wrongful Death Act was not intended to preserve a decedent's rights for his dependents is demonstrated by the existence of a separate New Jersey Survival Statute. This Act preserves the already existing rights of the decedent, while the Wrongful Death Act creates a new cause of action, which did not exist under General Maritime Law.

Just v. *Chambers*, 312 U. S. 383 (1941);
Turon v. *J. & L. Construction Company*, 8 N. J. 543, 86A. 2d 192 (Supreme Court, N. J. 1952).

In considering whether New Jersey Legislature intended to include unseaworthiness within the meaning of the Wrongful Death Act, it is important to bear in mind that

the Act, in its present form, was enacted in 1937, and was patterned upon the British Lord Campbells' Act of 1848. The protection of the warranty of seaworthiness was extended to a non-seaman for the first time in 1946, by the decision of this Court in *Sieracki* v. *Seas Shipping Company*, 328 U. S. 85 (1946).

Therefore, at the time this law was passed, shore workers had no right to sue for unseaworthiness. The legislature could not have intended to include in the Statute a right which did not exist at the time the law was enacted.

The New Jersey Courts which have considered the Wrongful Death Act have consistently confined its application to negligence situations. This has been true even where the facts would support a claim of unseaworthiness. *Moran* v. *Moore McCormack Lines*, (1944) 131 N.J.L. 332, 35A. 2d 415; *Santa Maria* v. *Lamport & Holt Line, Ltd.* (E.A. 1938) 119 N.J.L. 467, 196 Atl. 706.

Moreover, the Federal Courts, in considering similar statutes of other states, have uniformly held that they apply to actions for negligence, and not to unseaworthiness. *Graham* v. *Lusi*, 206 F. 2d 233 (CA-5, 1953); *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955); *Byrd* v. *Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E.D.La), 227 F. 2d 958 (CA-5, 1955), cert. den. 351 U. S. 925.

POINT III

The warranty of seaworthiness does not extend to Halecki.

It is the respondent's position that Halecki, an electrician employed by a sub-contractor to clean generators, was not doing the type of work which entitled him to the warranty of seaworthiness.

This doctrine was first extended to nonseamen by this Court in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946). There it was held that longshoremen, engaged in loading a vessel, are performing seamen's work, and that they are therefore entitled to the same protection. The Court reasoned that a shipowner should not be allowed to avoid liability to those engaged in ship's service by arranging to have the work done by independent contractors.

The decisions which followed Sieracki expanded the warranty of seaworthiness to include, not only longshoremen, but other harbor workers, whose duties, like those of seamen, were performed in the service of the ship.

In each instance, the determination depended upon the type of work done by the injured person, and was not based on the name given to his calling or trade.

This criterion was followed by this Court in *Pope & Talbot* v. *Hawn,* 346 U. S. 406 (1953). Hawn was a carpenter, employed by an independent contractor to repair grain loading equipment so that the loading of the vessel could continue.

Mr. Justice Black, writing for the majority of this Court, emphasized that Hawn's work was preparing the

ship for the carriage of cargo, and that his function was similar to that of a longshoreman. In giving Hawn a cause of action for unseaworthiness, the Court stressed that his work was connected with the operation of the ship.

This Court expressly refrained from a general extension of the warranty of seaworthiness to cover all shoreside workers or repair men. The test continued to be the nature of the injured person's work.

The lower Court decisions have regularly observed this test. The warranty has extended to carpenters like Hawn, who was preparing the ship to receive cargo, and also to ship's cleaners, whose function was to clean the vessels' cargo compartments or tanks in preparation for loading. *Torres* v. *The Kastor*, 227 F. 2d 664 (CA-2, 1955); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (CA-3, 1953).

On the other hand, when the work done by the injured person was not in the ship's service, the Courts have declined to extend the warranty. The function of the worker was examined in each case, and no cause of action for unseaworthiness was given where the duties were not those traditionally performed by seamen.

Thus, the warranty has been withheld from repair yard employees, engineers, and ship's riggers, whose jobs were specialized and involved mechanical or structural repairs. *Berryhill* v. *Pacific Far East Lines, Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537; *Petersen* v. *United States*, 80 F. Supp. 84 (E.D.N.Y. 1947); *Meyers* v. *Pittsburgh Steamship Company*, 165 F. 2d 642 (CA-3, 1948). Circuit Judge Hand, who wrote the majority opinion in *Halecki*, agreed that the test to be observed was the nature

of the work performed. However, he stated that he saw no difference between the work done by Halecki and that done by Hawn.

It is respectfully submitted that Halecki's work was completely unlike that done by Hawn, or by any other worker to whom the warranty of seaworthiness has been extended. Halecki was a trained and specialized electrician, who ordinarily worked ashore. The very nature of the task of cleaning generators required that the ship be out of operation, and the power was in fact off when Halecki worked on the ship.

Moreover, Halecki's job required special equipment, owned by his employer, which was engaged by the repair yard as a sub-contractor, because the work was so specialized that the repair yard was itself not equipped to perform it.

In extending the doctrine to apply to Halecki, the majority opinion characterized the decedent's work as "cleaning the ship". However, Halecki's work of removing grease from the ship's generators by spraying them with carbon tetrachloride was totally unlike the work done by ship's cleaners, who were hired to clean the vessel's cargo compartments in preparation for the reception of cargo.

The dissenting opinion of Circuit Judge Lumbard in *Halecki* took particular exception to the characterization of Halecki as a "ship's cleaner", which he described as a play on words. He emphasized that Halecki, an outside specialist, did work which had never been done by seamen.

Judge Lumbard also referred to the inconsistency shown by the result in *Berge* v. *National Bulk Carriers Corp.*,

251 F. 2d 717 (CA-2, 1958), cert. den. 2 L. Ed. 2d, 1066, which was decided by the same panel of the Court of Appeals for the Second Circuit, on the same day as the *Halecki* decision was handed down. The Second Circuit, again speaking through Judge Hand, affirmed the dismissal of the complaint of Berge, a shipyard rigger, and found that he was not entitled to the protection of seaworthiness.

Further support for the contention that Halecki was not doing seamen's work is found by a comparison with *Berryhill* v. *The Pacific Far East Lines*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537. In refusing to extend the warranty, the Court pointed out that Berryhill, a repair man, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation.

The nature of Halecki's work was also such that it could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done by seamen.

The *Berryhill* decision also demonstrated that a shipowner does not warrant the seaworthiness of equipment not usually furnished and necessarily required by the ship. Reference was made to the decision of this Court in *Pettersen* v. *Alaska Steamship Co.*, 205 F. 2d 478 (CA-9, 1953). There the owner was held liable for the unseaworthiness of a block which had been brought aboard the ship by the stevedoring company for use in loading the vessel.

However, the Ninth Circuit in *Berryhill* declined to hold the owner responsible for a defective grinding wheel which had been furnished by the shipyard where the vessel was being repaired. He distinguished between the block used

in the *Pettersen* case, which was similar to ship's equipment, and machinery like the grinding wheel.

Therefore, it does not seem that the *Pettersen* doctrine was intended to hold a shipowner liable for the inadequacies of specialized equipment brought aboard by subcontractors. Liability has been imposed in *Halecki* because of the alleged inadequacy of the ventilation equipment, incluuding portable blowers, fans, air hoses and gas masks, all of which were brought aboard by the decedent, himself. None of this equipment, except the vessel's own permanent ventilators, was owned or supplied by the vessel, and none of it was connected to the operation of the vessel.

POINT IV

Respondent failed to establish the existence of a defective condition.

Regardless of the various legal issues discussed in this brief, petitioner contends that upon the trial there was a complete failure of proof of the existence of either negligence or unseaworthiness. It has been argued that the decision of this Court in *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523 (1956), was authority for submitting this case to the jury. However, a comparison of the facts discloses that the *Schulz* doctrine has no application in the instant case.

Although there were no witnesses to Schulz' death, the record contained evidence of several dangerous conditions which could have caused the fatal accident. This Court

held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of the existence of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the petitioner's vessel, and then to further surmise that this supposed condition caused the decedent's death.

The issue in *Halecki* was the adequacy and condition of a ventilation system on the vessel, as it existed on the day when the decedent worked aboard. The only factual witness on behalf of the claimant was the decedent's coworker, who testified that the ventilation system was adequate, and was operating efficiently.

The plaintiff's expert witness testified that he had never been aboard the vessel and that he was without knowledge of any factors which he admitted were necessary to form an opinion of the conditions which existed, such as the dimensions, arrangement, location and condition of the equipment used. Furthermore, he specifically admitted on cross examination that he did not know whether the ventilation system aboard the ship was inadequate.

Although *Schulz* and other cases have demonstrated that a jury should be permitted to decide which of several possible inferences is the most reasonable, it has always been held that there must be some evidence upon which to base the inference. *Lavender* v. *Kurn*, 327 U. S. 645 (1946).

Moreover, it is basic that a hypothetical question must be based upon facts which are in evidence. Petitioner contends that the plaintiff's experts' testimony should have been excluded because of his admission that he could not answer without facts which were not within his knowledge, and upon which no testimony had been received. *Virginia Beach Bus Line* v. *Campbell*, 73 F. 2d 97 (CA-4, 1934).

The majority opinion in *Halecki* disposed of that portion of the appeal which was based on insufficiency by stating that the competence of the plaintiff's expert witness was within the discretion of the trial court, and cited cases where the qualifications of the experts had been questioned.

No question concerning the witnesses' qualifications have been raised by the petitioner, who contends that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself.

Accordingly, the action should have been dismissed.

ARGUMENT

POINT I

The State rule of contributory negligence should be applied to an action under a state wrongful death act.

(a) The Rights of Litigants should be Determined by the Substantive Law of the Jurisdiction in which Each Right Originates.

This respondent, as the administratrix of a fatally injured shore worker, brought an action based solely on the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, and any rights which she may have are derived from that statute. Resort to the state act was necessary because it has been firmly established that the General Maritime Law contains no provision for a death action. *The Harrisburg*, 119 U. S. 199 (1886); *Lindgren* v. *United States*, 281 U. S. 38 (1930). The source of the respondent's rights was therefore clearly not the General Maritime Law.

However, persons seeking damages for death resulting from Maritime tort have been permitted to rely upon rights given by the state within which the alleged wrongful act was committed, and Admiralty Courts have recognized state statutes and the rights which they supply. The General Maritime Law has been supplemented by the various state death and survival statutes, and it has been recognized that the state law thereby supplies rights not found in Maritime Law. *Just* v. *Chambers*, 312 U. S. 383 (1941); *Western Fuel* v. *Garcia*, 257 U. S. 233 (1921) and *The Hamilton*, 207 U. S. 398 (1907).

After it had been determined that Federal Courts would enforce these new rights which had been created by State Law, the question then arose as to whether their validity would be determined by state or maritime rules. This Court considered the source of the rights, and held that state substantive law should apply.

In *The Harrisburg, supra,* the Supreme Court of the United States unanimously ruled that an action brought under a state death statute was necessarily restricted by the State Statute of Limitations. After holding that the claimant had no cause of action at maritime law, and that his only right came from the State Death Act, Mr. Chief Justice Waite, stated at page 214:

> "It would seem clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations, which have been made part of its existence. . . ."

A similar fact situation was considered in *Western Fuel* v. *Garcia,* 257 U. S. 233 (1921), where this Court reversed a judgment in favor of a libelant who had sued under a State Wrongful Death Act, after the expiration of the State Statute of Limitations. Mr. Justice McReynolds, in enforcing the one year State Time Limitation, held that state law may modify or supplement Maritime law without interfering with its uniformity.

Again this Court looked to the origin of the right in determining the substantive law to be applied to an action under a state Wrongful Death Statute in *Levinson* v. *Deupree,* 345 U. S. 648 (1953), and held that "a time

limitation deemed attached to the right of action created by the state is binding in the federal forum" (p. 651).

This question has frequently arisen in the various Circuit Courts of Appeal which have almost uniformly followed the rule that admiralty courts will apply substantive state law when invoked to protect rights given by the State. A statement typical of this position was made by the Court of Appeals for the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (CA-5, 1953), which was brought under the Florida Death Statute. It was stated at page 225:

> "We are in no doubt that the appellant's right of action under Section 768.01 N. S. A., like other rights of action arising in admiralty under Lord Campbell's Act and similar acts, is to be enforced according to the principles of the Common Law, and contributory negligence and the exercise of due care are absolute defenses thereunder. Without this statute, the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representative of a deceased maritime employee to recover indemnity for his death."

The same Circuit made similar decisions in *Hartford Accident & Indemnity Company* v. *Gulf Refinery Company*, 230 F. 2d 346 (CA-5, 1956); and *Byrd* v. *Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E. D. La., 1954), aff'd 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

Identical results were reached by the Sixth Circuit in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955); and by the Third Circuit in *Klingseisen* v. *Costanzo Transportation Company*, 101 F. 2d 902 (CA-3, 1939); *Curtis* v. *Garcia*, 241 F. 2d 30 (CA-3, 1957), and *Hill* v. *Waterman*, 251 F. 2d 655 (CA-3, 1958).

Parenthetically, *Hill* was decided by the Third Circuit shortly after the *Halecki* decision was handed down. The Second Circuit in *Halecki* had relied heavily upon the Third Circuit holding in *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14 (CA-3, 1957), in finding that the N. J. Death Statute encompassed unseaworthiness. However, the *Halecki* decision took the additional step of applying comparative negligence, which was expressly rejected by the Third Circuit in *Hill* v. *Waterman, supra.*

The Courts have consistently applied the substantive law of the jurisdiction which created the right, whether state or maritime in origin. It is apparent that the force of the rule is felt in both directions, and that state rights, as well as federal, will be protected.

For example, *Garrett* v. *Moore-McCormick*, 317 U. S. 239 (1942), involved an injured seaman, suing under the Jones Act, in the State Court of Pennsylvania. Garrett's right clearly originated in the General Maritime Law, and it was held that State courts must enforce substantive rights arising from admiralty law in accordance with maritime principles. The opinion, delivered by Mr. Justice Black, demonstrated the Court's intention to protect substantive rights rooted in state law, as well as those created by Maritime Law. It was stated at page 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction by which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by State law (Erie Railroad Co. v. Tompkins, 304 U. S. 64). And Admiralty Courts

> when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state."

The *Garrett* opinion referred with apparent approval to *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938), as did *Pope & Talbot* v. *Hawn*, 346 U. S. 406, (1953). *Erie Railroad*, which outlined the relationship between state and federal law, also involved the validity to be given by a federal diversity court to a defense afforded by state law. Stated briefly, it was held that federal district diversity courts must try state created causes of action in accordance with state laws.

This principle is not inconsistent with this Court's holding that maritime rights must not be subordinated to state common law. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917). There is no contradiction among these decisions, as each right is enforced in accordance with its origin.

Therefore, petitioner respectfully submits that Halecki's rights should have been decided in accordance with the state law which created those rights. It is settled law in New Jersey that contributory negligence is a complete bar to recovery. *Blaker* v. *The Receivers of the New Jersey Midland Railroad Company*, 30 N. J. Eq. 240 (1878); *The New Jersey Express Company* v. *Nichols*, 33 N. J. L. 434 (1867); *Donus* v. *Public Service Railway*, 102 N. J. L. 644 (1926).

Erie Railroad v. *Tompkins*, *supra*, made it clear that the judicial decisions of state law are to be as binding as the legislation of a state. It was stated at page 78 of the *Erie Railroad* opinion:

> "Except in matters governed by federal constitution or by acts of congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

(b) The Decision in *Pope and Talbot v. Hawn* did not Change the Rule that the Source of a Right must Determine the Law to be Applied.

Circuit Judge Hand, in the *Halecki* majority opinion, agreed that contributory negligence had been a complete defense to an action brought under a Lord Campbell's Act because of a maritime tort (R. 152). However, referring to dictum in *O'Leary* v. *U. S. Lines*, 215 F. 2d 708 (CA-1, 1954), Judge Hand held that this principle had been changed by the ruling of this Court in *Pope and Talbot* v. *Hawn*, 346 U. S. 406 (1953), where a carpenter sued for injuries sustained aboard ship. It was found that Hawn's right to sue for negligence and unseaworthiness was rooted in Federal Maritime Law, and that the Federal Rule of comparative negligence should be applied. Particular reliance was placed upon the following language of the majority opinion in *Hawn*, pages 409-410:

> "The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even if Hawn were seeking to enforce the state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement Federal Maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of Congress, or interpretative opinions of this Court."

Mr. Justice Black, who delivered the *Hawn* opinion, cited as his authority for the above statement the case of *Garrett* v. *Moore McCormack*, 317 U. S. 239 (1942). That opinion, which was also written by Mr. Justice Black, distinguished between rights originating in Maritime Law and those rooted in state law and held that substantive rights are to be enforced in accordance with the jurisdiction in which the right originates. This statement, which we have quoted previously in this brief, emphasized that admiralty courts will protect rights rooted in state law as well as those created by Maritime Law.

These statements, when read together, leave no doubt that Mr. Justice Black did not intend that an action under a state wrongful death statute should be controlled by the principles of the General Maritime Law.

Byrd v. *Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E. D. La., 1954), aff'd 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

The petitioner respectfully contends that the *Hawn* decision, and the statement quoted above, are completely consistent with the prior rulings of this Court, and with the position taken by this petitioner. No change was made in the principle that a right is to be enforced in accordance with the substantive law of the jurisdiction in which it originated.

Again, the test is the origin of the right. Hawn was an injured but living plaintiff, and it is not disputed that his right to sue for negligence and unseaworthiness was given by maritime law. As such, the extent of his right was correctly measured by the admiralty rule of comparative negligence.

Hawn, unlike Halecki, was not required to rely upon a state created right, and therefore was not bound by State limitations. It is interesting to note that the sentence of the *Hawn* opinion immediately preceding the portion quoted in *Halecki*, stated:

> "Hawn's complaint asserted no claim created by or arising out of Pennsylvania law." (Page 409)

The respondent's right in *Halecki* is entirely different from that of *Hawn*, both in origin and in nature. The state death statute gives the decedent's family a right to sue for the pecuniary loss it suffered as a result of the death, and this right could not come into existence until after death. Hawn's right, to sue for his own pain and suffering, lost income and other damages, while living, was clearly given by the General Maritime Law.

There is nothing incongruous in applying comparative negligence to the right of a living claimant, and in applying contributory negligence to the rights of his dependents. The State Wrongful Death Act creates a new right of action, not for the injury to the deceased, whose own right came from the Maritime law, but for the injury to those who suffered loss by reason of the death. *Curtis* v. *Garcia*, 241 F. 2d 30 (CA-3, 1957).

Therefore, it seems clear that Mr. Justice Black was not referring to a State Death Action in the statement quoted in *Halecki*. "Even if Hawn was seeking to enforce a state created remedy for this right, Federal Maritime law would be controlling." (R. 153)

Again, the "right" to sue for maritime injuries originated in admiralty, and Maritime law would be controlling,

no matter what remedy Hawn used to enforce that right. Hawn could have sued in a state court, under the savings to suitors clause. Moreover, if he had died, his estate could have preserved his maritime rights by resort to the State Survival Statute. *Just* v. *Chambers*, 312 U. S. 383 (1941).

In either case, the origin of Hawn's rights would remain maritime, and the use of the remedy would not affect the application of Maritime law. Therefore, this statement is not inconsistent with the petitioner's position.

Survival statutes, including that of New Jersey, Revised Statutes of New Jersey, 2A:15-2; N.J.S.A. 2A:15-2, afford a remedy for enforcing already existing rights, to recover for damages suffered by the decedent prior to his death. These rights vest in the decedent's estate, and have their origin in the General Maritime Law. It is completely consistent to measure them by the admiralty rule of comparative negligence. *Curtis* v. *Garcia, supra.*

The very existence of both wrongful death statutes and survival statutes emphasizes that an injured person's own rights are distinct from the right of his family to recover for their damages, resulting from his death. The survival statute merely preserves an existing right originating in General Maritime Law, while the death act creates a new right, which did not previously exist. It is significant that Halecki sued only under the wrongful death act of New Jersey, and not under New Jersey Survival Statute.

The effect of the *Hawn* decision was considered by the Third Circuit in *Curtis* v. *Garcia* (*supra*), and later by the majority opinion in *Halecki*. The *Curtis* opinion at page 34, pointed out the distinction between Hawn's rights and

those of the administratrix, in a statement which would be fully applicable to *Halecki*:

> "Hawn had a right of action, independent of any Pennsylvania law, because his injury resulted from a maritime tort and was not fatal. Here, the injuries were fatal and neither the administratrix nor those for whose benefit her claim under the wrongful death statute is asserted had any right of action, under maritime law, to recover damages for the decedent's death, even though it resulted from a maritime tort. She did not seek to enforce any maritime right by a state created remedy. . . .
>
> The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created."

The *Halecki* decision referred to dictum contained in the majority opinion in *O'Leary* v. *U. S. Lines Company*, 215 F. 2d 708 (CA-1, 1954). The dissent of Judge Hartigan in that case thoroughly reviewed the authorities, and took sharp exception to the majority's interpretation of *Hawn*. A clear distinction was drawn between the rights of Hawn which were "rooted in maritime law" and those of claimants under state death statutes which are state created.

Therefore, it is the position of the petitioner that *Pope and Talbot* v. *Hawn, supra*, which was the sole authority relied upon by the majority in *Halecki* in applying comparative negligence, has not changed this court's policy of

protecting rights rooted in state law. The rights of litigants are still to be enforced in accordance with the substantive law of the jurisdiction in which those rights originated, and more specifically, the rights of parties to an action under a state death act should be determined by the state rule of contributory negligence.

(c) Litigants will not Receive Equal Protection of the Law Unless Their Rights are Determined by Their Origin.

It has been suggested that adherence to the principles of determining rights in accordance with their origin would bring about inequities and lack of uniformity. However, the facts of the *Halecki* case demonstrate that the reverse is true.

The obligations of this defendant are imposed upon it by state law, which, in justice and reason, should also be the source of the defendant's rights. The application of the maritime rule of comparative negligence would deprive this and other marine defendants of a defense given to every other party sued under the state death statute.

Persons engaged in maritime industry thereby become the only class of litigants to bear the obligations imposed by state law without the protections contained in that law. It is respectfully contended that state law should not be applied piece meal with reliance only on that portion which aids one party. The rights of defendants should be protected as zealously as the rights of claimants.

Conversely, the decision of the majority in *Halecki* would clearly prevent the equal application of the state law to all claimants. A person suing under the Wrongful Death Act because of the death of a maritime employee would receive

benefits not given to a party, suing under the same statute, whose decedent was injured ashore.

This incongruity was pointed out in *O'Leary* v. *U. S. Lines Co., supra*, in the dissent of Judge Hartigan, who referred to the Harvard Law Review article entitled *Erie Railroad* v. *Tompkins* and The Uniform General Maritime Law (Stevens), 64 Harvard Law Review 246. The article stated at page 266:

> "As the state statute—adopted by admiralty—created the rights of the parties, the state law should be referred to in order to determine the validity of the claim, even though these rights are derived from death resulting from a maritime tort. A contrary result will enable the admiralty courts to apply maritime rules to the state created right—such as the rule for divided damages instead of the defense of contributory negligence. As a result, parties asserting rights under the statute arising from a maritime tort would get preferential treatment as compared to parties claiming rights under the same statute because of a terrene tort."

POINT II

The New Jersey Wrongful Death Act does not give a cause of action for unseaworthiness.

(a) The Claimant's Rights Are Derived Only from State Law, As The General Maritime Law Does Not Provide For a Wrongful Death Action.

It is not disputed that there is no cause of action for wrongful death under the General Maritime Law. *The Harrisburg*, 119 U. S. 199 (1886); *The Hamilton*, 207 U. S. 398 (1907); *Lindgren* v. *United States*, 281 U. S. 38 (1930).

It is also firmly established that a claimant seeking damages for maritime injuries resulting in death may sue under the wrongful death act of the state within which the accident occurred, and moreover federal courts have been given jurisdiction of suits under state death statutes. *Levinson* v. *Deupree*, 345 U. S. 648 (1953); *Western Fuel Company* v. *Garcia*, 257 U. S. 233 (1921).

This claimant, therefore, could only rely upon rights created by state law, and brought an action pursuant to the New Jersey Wrongful Death Act, N.J.S.A. 2A:3-1 through 6. The administratrix sued only for pecuniary damages resulting from the death of the decedent, and did not bring an action under the New Jersey Survival Statute.

Aside from the questions of the decedent's right to the warranty of seaworthiness, which is discussed elsewhere in this brief, there is the issue as to whether the New Jersey Wrongful Death Act is broad enough to encompass a death claim allegedly resulting from unseaworthiness. In determining the scope of this statute, consideration must be paid to all available guides, including the language of the statute, the nature of the right, the intent of the legislature, and the applicable decisions.

(b) The Language Of The Statute Is Not Broad Enough To Encompass Unseaworthiness.

The majority opinion in *Halecki*, in holding that an unseaworthiness claim could be brought under the New Jersey Wrongful Death Act, found that the words "act, neglect or default" contained in this statute are broad enough to include unseaworthiness. In order to rationalize this interpretation, it appears necessary to consider "unseaworthiness" and "negligence" as synonomous terms.

However it has long been recognized that the elements of unseaworthiness are fundamentally different from those of negligence. It is not appropriate to review here the judicial evolution of unseaworthiness liability, but a cursory consideration of the decisions demonstrates the distinction.

Seas Shipping v. *Sieracki,* 328 U. S. 85 (1946) has often been quoted as an authority for the proposition that unseaworthiness is distinct from and not dependent upon negligence. Mr. Justice Rutledge, in discussing the nature of unseaworthiness, at page 94, stated:

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character."

The establishment of negligence on the part of a defendant depends on such factors as the lack of due care, failure to act reasonably, notice and control. However, none of these elements are essential in proving unseaworthiness, which is a completely distinct type of liability.

Although there are many fact situations which can spell out either negligence or unseaworthiness, the terms cannot be used interchangeably. This was demonstrated in *The Osceola,* 189 U. S. 158 (1903) which recognized unseaworthiness liability, and at the same time denied recovery for negligence. As the concept of unseaworthiness developed through successive decisions, it became clear that the courts did not intend that the elements of negligence should be necessary to establish unseaworthiness.

Any similarity to negligence was eliminated by this Court in *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 (1944), when it was established that a shipowner's duty to furnish a seaworthy vessel is absolute, not predicated on negligence and not satisfied by the exercise of due diligence.

Moreover, unlike a plaintiff seeking to prove negligence, a party suing for unseaworthiness need not establish that the defendant had notice of the defective condition. This distinction was pointed out by Chief Judge Denman of the United States Court of Appeals for the Ninth Circuit in *Lahde* v. *Society Armadora del Norte*, 220 F. 2d 357 (CA-9, 1957).

Judge Denman relied upon the decision of this Court in *Boudoin* v. *Lykes Brothers SS Co., Inc.*, 348 U. S. 336 (1955), in which liability for assault was imposed on an unseaworthiness theory, although there was no evidence that the shipowner could have known of the vicious character of the assailant.

Another traditional component of negligence is the factor of control. A defendant cannot be held liable for negligence unless it was in control of the premises or the appliance involved. Often cited for this principle is the New York case of *Cullings* v. *Goetz*, 256 N. Y. 287 (1931), in which Chief Judge Cardozo states: "Liability in tort is an incident to occupation or control."

In *Caldarola* v. *Eckert*, 332 U. S. 155 (1947), this Court also stated that liability for negligence could arise only when there was possession and control of the premises on which the injury occurred. However, control is not an essential element in establishing unseaworthiness, accord-

ing to *Alaska SS Co., Inc.* v. *Petterson*, 205 F. 2d 478 (CA-9, 1953), aff'd 347 U. S. 396 (1954), in which this Court affirmed judgment in favor of the libelant, a stevedore injured by defective equipment brought on board the vessel by the stevedoring company. The Ninth Circuit, again speaking through Chief Judge Denman, agreed that control of the vessel had been given up by the shipowner at the time of the accident, and specifically ruled that the vessel owner was liable for unseaworthiness, even though not in control of the ship.

Therefore, petitioner respectfully contends that to include a suit for unseaworthiness in the purview of the New Jersey Wrongful Death Act would be to ignore the basic distinction between unseaworthiness and negligence.

(c) The Rights Given By The New Jersey Wrongful Death Act Are Distinct From Those Of A Living Claimant.

Considering further the language of the Statute, counsel for the respondent has attached significance to the use of the words, "such as would", used in the following context:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime." N. J. Wrongful Death Act, N.J.S.A. 2A:31-1 through 6.

Counsel argues that the decedent would have had a cause of action for unseaworthiness if he had lived, and therefore, these words were intended to give that cause of action to the decedent's dependents.

This argument disregards the basic difference between the rights of a living party, injured by a maritime tort, and the rights given to the dependents of a decedent. An injured litigant has a maritime right to sue for his own damages, consisting of his pain and suffering, lost income and medical bills.

However, those dependent upon a deceased person are given by statute rights which did not exist, either at Maritime or common law. This cause of action, to recover the loss of financial support suffered by the family, does not come into existence until the decedent's death, and is given, not to the estate, but to the dependents, *Curtis* v. *Garcia*, 241 F. 2d 30 (CA-3, 1957).

The fact that the New Jersey Wrongful Death Act was not intended to preserve a decedent's right for his dependents is demonstrated by the existence of a separate New Jersey survival statute, upon which this claimant did not rely in the complaint.

This survival statute, Revised Statutes of New Jersey, 2A:15-2; N.J.S.A. 2A:15-2, states:

> "Executors and Administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living."

A cause of action is thereby given to the estate of a decedent to recover the damages the decedent himself suffered prior to his death. A fatally injured person's own right to recover for his pain and suffering, and other damages, would in the absence of the statute, die with him. *Just* v. *Chambers*, 312 U. S. 383 (1941). No new rights are created by survival statutes, which merely supply a remedy for enforcing already existing rights, *Soden* v. *Trenton & Mercer Traction Company*, 101 N. J. L. 393, 127 Atl. 558 (1925); *Hickman* v. *Taylor*, 75 F. Supp. 528, aff'd 170 F. 2d 327 (CA-3, 1948), cert. den. 336 U. S. 906.

A Wrongful Death Act, on the other hand, creates a new cause of action, which did not exist under the General Maritime Law. This statute gives the beneficiaries a recovery for the loss of anticipated support which they suffered because of the decedent's death, and has no relationship to the decedent's pain and other damages suffered before he died. *Turon* v. *J. & L. Construction Company*, 8 N. J. 543, 86 A. 2d 192 (1952).

The British Lord Campbell's Act (9-10 Vict. C. 93) which was the model for the New Jersey and other death statutes, contains almost identical language, including the "such as would" phraseology relied upon by libelant-respondent's counsel. However, it has been held that the British Act creates a new right for the beneficiaries, and does not merely preserve the injured person's own rights.

The distinction between wrongful death acts and survival statutes is defined by the English Court in *Blake* v. *Midland Railway Company*, 18 Q. B. 93, 110, 29 L. J. Q. B. 233, 16 Jur. 562 (1852).

Accordingly, it is respectfully submitted that the language of the statute, including the "such as would" clause,

fails to support the libelant-respondent's contention that the Wrongful Death Act encompasses the right to sue for unseaworthiness.

(d) The New Jersey Legislature Could Not Have Intended The Wrongful Death Act To Include Unseaworthiness.

Legislative intent is of course an important guide in determining the scope of a statute. A consideration of the date on which the New Jersey Act was passed makes it difficult to argue that the New Jersey State Legislature could have intended that the Act include a right to sue for unseaworthiness.

The statute was enacted in its present form in 1937, and was patterned almost verbatim upon the British Lord Campbell's Act of March 1848. Even at the time of the Law's most recent enactment, the right to sue for unseaworthiness belonged only to seamen, and not to shore workers. This right to a seaworthy vessel was extended to a non-seaman for the first time in 1946, by the decision of this Court in *Sieracki* v. *Sea Shipping Company,* 328 U. S. 85 (1946).

Therefore, the 2nd Circuit in *Halecki* attributed to the New Jersey Legislature an intent to include in the statute a right which did not exist at the time the Law was enacted. The Legislature then could not possibly have anticipated a death action, by the dependents of a shore worker, based upon a breach of the warranty of unseaworthiness.

This fallacy was referred to in a dissenting opinion of Circuit Judge Hastie, in *Skovgaard* v. *The M/V Tungus,* 252 F. 2d 14 (CA-3, 1957), which involved the same issue. Judge Hastie stated at page 20:

"Thus, to construe the New Jersey Statute as applicable to the present case, requires not only the inference that the New Jersey Statute was intended to create rights in accordance with Admiralty concepts of liability as they existed when the legislation was passed, but also that subsequent modifications of Admiralty concepts by the Federal Court routinely become a part of New Jersey policy and law."

(e) The Courts Have Not Interpreted The Various Lord Campbell's Acts As Encompassing Unseaworthiness.

A final and essential criterion in interpreting the State's statutes is the decisions of the New Jersey Courts which have considered the scope of the Act. Judge Hastie's dissent in *Skovgaard, supra,* gave great emphasis to the manner in which the New Jersey Courts had construed their own statute. His review of the precedents demonstrated that the New Jersey Court had consistently confined the application of the Act to negligence. He cited *Stewart* v. *Norton* (1951), 6 N. J. 591, 8 A. 2nd 111; and *DeCicco* v. *Marlou Holding Co.* (1948), 137 N. J. L. 186, 59 A. 2nd 227. Judge Hastie also referred to two New Jersey decisions relating to actions brought under the New Jersey Wrongful Death Act, as a result of fatal accidents occurring aboard ships. Both cases ruled that the liability of the shipowner depended upon proof of negligence. *Moran* v. *Moore McCormack Lines* (1944), 131 N. J. L. 332, 35 A. 2nd 415; and *Santa Maria* v. *Lamport & Holt Line, Ltd.* (E. & A. 1938), 119 N. J. L. 467, 196 Atl. 706.

Going beyond the New Jersey decisions, it is found that the precise point had been decided in cases arising under

the Lord Campbell's Acts of other States, all of which are similar in wording to the New Jersey Statute.

The question of whether a claim for unseaworthiness can be maintained under a State Death Statute was explicitly answered in the negative by the United States Court of Appeals for the Fifth Circuit in *Graham* v. *Lusi*, 206 F. 2d 223 (CA-5, 1953), where an action under the Florida Death Statute was considered. The decedent was a longshoreman whose fatal injury occurred as a result of a latent defect in ship's equipment. It was specifically stated at page 225:

> "There is a complete absence of merit in appellant's attempt to avoid the foregoing defenses by invoking a right of action for unseaworthiness which, being a right of action the deceased might have maintained had he simply been injured and lived, is clearly not preserved by the legislative enactment under which appellant proceeds."

This rule was also followed by the Fifth Circuit in *Hartford Accident & Indemnity Company* v. *Gulf Refining Company*, 230 F. 2d 346 (CA-5, 1956), and in *Byrd* v. *The Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E. D. La.), 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

The United States Court of Appeals for the Sixth Circuit made a similar finding in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955), which involved a death action brought pursuant to the Tennessee Wrongful Death Statute. After pointing out that the General Maritime Law gave no cause of action for wrongful death, and that any recovery must come from a State or Federal Statute, the Court stated at page 713:

> "It is not contended that any Federal Statute conferred a substantive right of action for wrongful death in this case. The right was conferred by the Statute of Tennessee allowing recovery only in the event of the appellee's negligence."

Accordingly, this claimant should not have been permitted to maintain an action for unseaworthiness.

POINT III

The warranty of seaworthiness does not extend to Halecki.

(a) Only Those Doing Work Traditionally Performed By Seamen Are Protected By The Warranty Of Seaworthiness.

Also before the Court of Appeals for the Second Circuit in *Halecki* was the question as to whether the decedent, a shoreside electrician, was entitled to the warranty of seaworthiness owed to seamen. Stated differently, was Halecki the type of shoreside worker to whom the protection of seaworthiness was extended by the decision of this Court in *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 (1946)?

That decision was the first major extension of the warranty of seaworthiness which had previously applied only to seamen. It was held that longshoremen are entitled to the rights of seamen because they perform a sailor's work. The basis for expanding the doctrine of seaworthiness was the similarity between the work done by longshoremen and seamen, as indicated by the Court's statement at page 99:

> ". . . Historically, the work of loading and unloading is the work of the ship's service, performed

> until recent times by members of the crew. . . . For these purposes he (the stevedore) is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."

The Court reasoned that a shipowner should not be allowed to avoid liability to those engaged in ship's service by arranging to have the work done by independent contractors.

Therefore, a review of the decisions following *Sieracki* is necessary to determine the meaning given to the expressions "seamen's work" and "ship's service", and to ascertain how far the warranty of seaworthiness is to be extended.

Sieracki was a longshoreman, and the cases which followed consistently held that loading and discharging cargo was "ship's work", and those performing it were entitled to a seaworthy vessel. As stated in *Sieracki*, this task had been traditionally performed by seamen, and the men who did that work have been given the same protection.

Strika v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (CA-2, 1950), cert. denied 341 U. S. 904; *Lauro* v. *U. S.*, 162 F. 2d 32 (CA-2, 1947); *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 2d 25 (CA-2, 1953), cert. denied 345 U. S. 965.

The application of the rule is less obvious in the cases of other harbor workers, such as ships' cleaners, repairmen and carpenters. However, the Courts have continued to examine the nature of the injured person's work, and its relation to the service of the ship. The determination for each case has not been based on the name of the party's trade, but upon the type of work he did.

A clear expression of this rule was made by the Trial Judge in *Berge* v. *National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S. D. N. Y., 1957), aff'd 251 F. 2d 717 (CA-2, 1958). Referring to *Berge*, a shipyard rigger, Judge Murphy stated at page 610:

> "The test then is not the name given to plaintiff's calling or trade, but the nature of his work, and viewed in this light it is abundantly clear that the plaintiff was not performing usual seaman's work
>
> . . .
>
> Since the whole rationale of Sieracki rests on the premise that a shipowner cannot escape its absolute obligation to provide a seaworthy vessel by contracting to have a third party perform the services traditionally performed by seamen, it becomes apparent that once the third party performs services different from those usually performed by seamen, the warranty of seaworthiness which was historically designed to protect seamen need no longer apply."

This criterion was affirmed by this Court in *Pope Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953), which is often cited as an extension of the *Sieracki* doctrine. However, a review of the opinion indicated that it was consistent with the cases holding that a claimant's right to seaworthiness depends upon the similarity between his work and that done by seamen.

Hawn was a carpenter employed by an independent contractor, and at the time of his accident was working aboard a vessel which had been loading a cargo of grain. The loading operation had been temporarily interrupted because of a minor defect in the grain loading equipment, and Hawn was engaged in repairing this equipment so

that the loading could continue. It had been argued on behalf of the shipowner that Hawn was not a stevedore like Sieracki, and that the warranty of seaworthiness should not extend to him. However, Mr. Justice Black, writing for the majority of this Court, emphasized that Hawn's work involved preparing the ship for the carriage of cargo, and that his function was therefore similar to that of a stevedore. It was stated at page 413:

> "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or who were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Hawn's work had been previously characterized by the Court of Appeals for the Third Circuit at 198 F. 2d 800, where it was stated:

> "Hawn was . . . rendering service necessary in the performance of the ship's business of carrying cargo. The difference between Hawn and the longshoreman in the Sieracki case is at most, one of slight degree." (Page 803)

Hawn's duties were further described by the opinion of the District Court which stated, 99 Fed. Supp. 226 at page 229:

> "The doctrine of seaworthiness applied to plaintiff, whose duties had a direct relation to the proper loading and handling of the ship's cargo in preparation for a voyage."

The consideration given by each opinion to the relationship between Hawn's work and the loading of cargo discloses the importance attributed to that connection.

The opinion of this Court expressly refrained from a general extension of the warranty of seaworthiness to cover all shoreside workers or repair men. The emphasis placed upon the similarity between Hawn's work and that of Sieracki appears to indicate strongly an intention to include in the expressions "seaman's work" and "ship's service" only those tasks which are involved in some way in loading or preparing the vessel for the reception of cargo, or in the actual operation of the ship. In other words, the warranty applies only to those whose work is similar to that of seamen.

A review of lower Court decisions demonstrates that this distinction has been followed. In *Torres* v. *The Kastor*, 227 F. 2d 664 (CA-2, 1955), the warranty of seaworthiness was extended to a person known as a ship's cleaner. At the time of his injury, Torres was engaged in cleaning the vessel's cargo compartments in preparation for the loading of new cargo. Therefore, Torres' work, like that of Hawn, was directly connected with the carriage of cargo, and was considered "seamen's work", within the meaning of *Sieracki*.

Liability for unseaworthiness was imposed in *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (CA-3, 1953), which involved a ship's cleaner who was injured while cleaning

the vessel's deep tanks. The Court pointed out that at the very time when Crawford was so employed, crew members were doing the same work, and that both should have the same protection.

On the other hand, the Courts have declined to extend the *Sieracki* doctrine to cover shoreside workers not performing "seamen's work", i.e., work related to the carriage of cargo. The claimant in *West* v. *United States*, 143 Fed. Supp. 473 (S. D. N. Y., 1956) was a marine engineer employed by a repair yard. It was held that the work performed by West was not of the type ordinarily performed by seamen and that the action did not therefore fall within the doctrine of the *Sieracki* and *Hawn* cases.

The Court of Appeals for the Third Circuit held that a rigger employed by a shipyard was not entitled to the protection of seaworthiness in *Meyers* v. *Pittsburg Steamship Company*, 165 F. 2d 642 (CA-3, 1948).

Reference to the relationship between the type of work and the loading of cargo was made in the Court's opinion in *Petersen* v. *United States*, 80 Fed. Supp. 84 (E. D. N. Y., 1947), which also involved a shipyard employee, injured aboard a vessel. It was stated at page 88:

> "Since libelant was not a member of the crew, or a stevedore engaged in loading cargo, but an employee of a contractor repairman, he was not entitled to a seaworthy ship on which to work."

More recently, the Court of Appeals for the Ninth Circuit considered the question in *Berryhill* v. *Pacific Far East Line Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537, and refused to extend the warranty of seaworthiness to cover a shipyard employee injured while the vessel was undergoing repairs. Judge Barnes, expressing the

unanimous opinion of the Court, reviewed the decisions of this Court in *Hawn, Petterson and Rodgers* v. *U. S. Lines*, 347 U. S. 984 (1954). It was pointed out that all of these claimants were injured while engaged in "ship's work", i.e., loading and unloading.

(b) Halecki Was Not Performing Work Traditionally Done By Seamen.

Judge Hand, who wrote the majority opinion in *Halecki*, agreed that the test to be observed was the nature of the work performed. He referred to *Guerrini* v. *U. S.*, 167 F. 2d 352 (CA-2, 1948), in which he, speaking for the Court of Appeals, had refused to apply the *Sieracki* doctrine to the libelant, who had been injured while cleaning boilers aboard a ship. However, Judge Hand found that his opinion was changed by the holding of this Court in *Pope & Talbot, Inc.* v. *Hawn, supra*, and further stated that he could not see a distinction between the work done by Halecki and Hawn (R. 150).

However, it is respectfully submitted that a comparison of the facts in each case demonstrates that Halecki's work was completely unlike that done by Hawn. As we have pointed out, this Court emphasized that Hawn's work in repairing loading equipment was like that of a stevedore, and was directly connected with the service of the ship.

However, it seems evident that Halecki was not performing work traditionally done by seamen. He was a trained and specialized worker, an electrician who ordinarily worked ashore. The very nature of the task of cleaning generators required that the ship be out of operation, and the vessel's power was in fact off when Halecki worked on the ship.

Halecki's job could not be performed while the ship's power was on, and it required special equipment, which was brought aboard by the decedent and his co-worker (R. 12) (R. 82). The work was so specialized that the repair yard engaged to overhaul the vessesl was not itself equipped to perform it, and therefore the decedent's employer was engaged by the repair yard as an electrical subcontractor (R. 16).

Certainly the duties of Halecki had no relation to the loading and handling of cargo, nor was it work which had ever or could have been performed by seamen.

It is respectfully submitted that the majority opinion in *Halecki* misunderstood the nature of the work performed by Halecki, and that the warranty of seaworthiness was erroneously extended. The opinion characterized the decedent's work as "cleaning the ship", although the decedent was an electrician, employed by a subcontractor, and was engaged to perform specialized work aboard the ship while it was out of operation.

"The ship's cleaners" to whom the warranty was extended in other cases were men whose duties were, like that of Torres, to clean the ship in preparation for the reception of cargo.

The fallacy in characterizing Halecki as a ship's cleaner was emphasized by the dissenting opinion of Judge Lumbard, who contended that the warranty of seaworthiness should not be extended to workers such as Halecki. Judge Lumbard stated (R. 458):

> "My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is a kind of work a seaman would normally

do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of sea worthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and common place; it is a play on words which by a characterization avoid dealing with a difference in means which completely destroys the validity of the syllogisms. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman."

Judge Lumbard's dissent also referred to the interesting parallel between *Halecki* and *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (CA-2 1958). Berge was a rigger employed by a shipyard which was engaged in installing bulkheads aboard the defendant's vessel. Among the numerous points of similarity between *Berge* and the case at bar was the fact that both vessels were tied up at piers in repair yards. Moreover, officers of both vessels were aboard in a supervisory capacity, although the work in both instances was performed by the repair yards and their sub-contractors.

The Trial Judge found that the services performed by Berge were different from those usually done by seamen, and that consequently the warranty of seaworthiness did not apply. The appeal to the Court of Appeals for the Second Circuit was argued before the same panel which decided *Halecki*, and the *Berge* decision was handed down on the same day.

The Second Circuit, again speaking through Judge Hand, affirmed the dismissal of the complaint, and found

that Berge was not entitled to the protection of seaworthiness.

In commenting upon the inconsistency demonstrated by the different results reached by the same panel in the two cases, Judge Lumbard stated in his dissent (R. 159):

> "What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seamen's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in Berge, the work required the cessation of ship's operations and the removal of the crew."

Commenting further upon the nature of Halecki's work, Judge Lumbard stated (R. 157):

> "Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew-member had ever done on this ship or any where else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyards, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the same performance of the hazardous activities."

Further support for the contention that Halecki was not doing seamen's work is found by a comparison with *Berryhill* v. *Pacific Far East Lines, Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537, in which the Ninth Circuit had found that the plaintiff was not doing work which entitled him to the warranty of seaworthiness. The Court pointed out that Berryhill, a repairman, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation.

The circumstances in the instant case were similar to those in *Berryhill*, for in both instances, the work could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done by seamen.

(c) A Shipowner Does Not Warrant The Seaworthiness Of Equipment Not Connected With The Operation Of The Ship.

The *Halecki* opinion also referred to *Pettersen* v. *Alaska S.S. Co.*, 205 F. 2d 478 (CA-9, 1953), as authority for imposing liability for unseaworthiness in the instant case. In *Pettersen*, this Court affirmed the opinion of Chief Judge Denman of the Ninth Circuit, who held that the ship was liable for a defect in a block, which had been brought aboard ship by the stevedoring company for use in loading the vessel.

The limitations of the *Pettersen* decision were pointed out by Judge Barnes of the Ninth Circuit in *Berryhill* v. *Pacific Far East Line, supra.* There the defective equipment was a grinding wheel furnished by the shipyard. Judge Barnes declined to impose liability and pointed

out that the equipment considered in *Pettersen* was a snatch block, used in loading. He stated at page 387:

> "This equipment took the place of equipment usually furnished and necessarily required by the ship. It was ship's equipment necessary to enable the crew to perform "ship's work", i.e., loading and unloading. . . . Appellant asks us to step one further pace toward an absolute liability of the owner of a vessel for defects existing in equipment that the ship could do without, that the owner may never have bought or even see, or have had any reason to know it existed."

A review of the facts in *Halecki* demonstrates that the *Berryhill* principle and not that of *Petterson* should be applied here. Liability has been imposed because of the alleged inadequacy of the ventilation equipment in use aboard the vessel. This equipment consisted of portable blowers, fans, air hoses, gasmasks and tanks of carbon tetrachloride, all of which were brought aboard the vessel by the decedent and his co-worker. None of this equipment, except the vessel's own ventilators, was owned or supplied by the vessel, and none of it was connected in any way to the operation of the vessel.

It does not seem that the *Pettersen* doctrine was intended to hold a shipowner liable for the inadequacies of specialized equipment brought aboard by subcontractors, for use in an operation which could only be conducted while the ship's power was off, and which was not connected in any way to the service of the vessel.

POINT IV

Respondent failed to establish the existence of a defective condition.

Regardless of the various legal issues heretofore discussed in this brief, petitioner contends that upon the trial there was a complete failure of proof of the existence of either negligence or unseaworthiness, and that the case should not have been submitted to the jury. Although the sufficiency of evidence is not ordinarily a matter which this Court wishes to review, it is felt that the absence of valid testimony on this point is so complete that a reversal and dismissal is justified, even at this time.

The petitioner does not maintain that the mere necessity of speculation on the part of the jury indicates that the evidence is insufficient. This principle was demonstrated by the decision of this Court in *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523 (1956). However, a comparison of the facts indicates that the authority of *Schulz* has no application to the *Halecki* case.

Schulz met his death by drowning. Although there were no witnesses, the record contained evidence of several negligent or dangerous conditions which could have caused the decedent's death. This Court held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of the existence of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the petitioner's vessel, and then to further sur-

mise that this supposed condition caused the decedent's death.

The issue in *Halecki* was the adequacy and condition of a ventilation system, as it existed aboard the vessel on the day when the decedent worked there. The sole factual witness on behalf of the claimant was Donald Doidge, who was the decedent's co-worker. Doidge, who had previously given a deposition for the defendant, testified that the portable ventilators and other equipment were assembled properly, that the ship's ventilation system, which was powered from shore, was operating efficiently, and that he was satisfied that the ventilation was adequate for the job (R. 11-15).

In addition to the testimony of Mr. Doidge, the claimant relied upon Robert P. Gaines, a bio-chemist, who appeared as an expert witness (R. 18).

Although Doctor Gaines had never been aboard the vessel in question (R. 28), he was permitted to answer hypothetical questions based upon the general description of the engine room contained in witness Doidge's testimony. Over the objection of defendant's counsel, Doctor Gaines stated that there was a dangerous concentration of carbon tetrachloride present in the engine room, and moreover that the ventilation system was inadequate (R. 22-24).

However, upon cross examination, Doctor Gaines admitted that his calculation did not take into consideration essential factors such as the power and location of the portable blowers, the arrangement and pressure of the air hoses, the power and blade size of the fans, and the power and construction of the ship's ventilation system

(R. 28-31). Most significantly, Doctor Gaines specifically admitted upon cross examination that he did not know whether the ventilation system aboard the ship was adequate (R. 32).

The defendant had introduced testimony that Halecki's death from carbon tetrachloride poisoning was due to his susceptibility to even a slight exposure far below the generally accepted safe margin. This testimony, given by Doctor Milton Halpern, the New York State Medical Examiner, established that a person who habitually drinks to excess could be fatally injured by a slight and ordinarily harmless exposure (R. 37-38). The record also showed that the decedent drank excessively (R. 18).

It is apparent that the appellee's claim and the jury verdict were based upon inverse reasoning. The evidence disclosed that the decedent died of carbon tetrachloride poisoning, and the jury was permitted to speculate that the death was caused by a defective condition aboard the vessel, although the record contained no evidence that such a defect existed.

Although *Schulz* and other cases have demonstrated that a jury should be permitted to decide which of several possible inferences is the most reasonable, it has always been held that there must be some evidence upon which to base the inference. In a decision of this Court, made in *Lavender* v. *Kurn*, 327 U. S. 645 (1946), it was stated at page 653:

> "Whatever facts are in dispute or the evidence is such that fairminded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to

> settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

It is a basic rule of evidence that a hypothetical question must be based upon facts which are in evidence. Petitioner contends that Doctor Gaines' testimony should have been excluded, because of his admission that he could not answer without facts which were not within his knowledge, and upon which no testimony had been received. In *Virginia Beach Bus Line* v. *Campbell*, 73 F. 2d 97 (CA-4. 1934), the rule was stated as follows at page 99:

> "It would be reversible error to permit the answer of an expert witness to a hypothetical question which assumes the existence of facts upon which no evidence is offered."

A succinct expression of a plaintiff's burden to establish affirmative evidence was made by this Court in *Moore* v. *Chesapeake and Ohio Railroad Company*, 340 U. S. 573 (1951), where it was stated at page 578:

> "Speculation cannot supply the place of proof."

The majority opinion in *Halecki* disposed of that portion of the appeal which was based on insufficiency by stating that the competence of the plaintiff's expert witness was within the discretion of a trial court. The cases cited for this holding involved instances where the qualifications of the experts had been questioned (R. 149).

The petitioner respectfully submits that the majority misinterpreted this phase of the appeal, as the qualifications or the competency of the expert witness was not questioned. The appellant contended that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself. Accordingly, it is the position of the petitioner that the evidence not only failed to establish a causal connection between the decedent's death and a defective condition aboard the vessel, but also did not establish that any defective condition in fact existed. Therefore, the action should have been dismissed.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed, and that the action should be dismissed. In the alternative the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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